IN THE COURT OF APEAL

AT NAIROBI

(CORAM: M'INOTI, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 159 OF 2017 (UR 124/2017)

BETWEEN

JAMES WAWERU MUTURI.....APPLICANT

AND

PAUL THUO NJAMBI.....…RESPONDENT

***(An application for extension of time to file and serve a notice of appeal out of time from the ruling and order of the Environment & Land Court (Obaga, J.) dated 9th May 2017* in ELC C. No. 719 of 2016)**

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RULING

The applicant, ***James Waweru Muturi***, an advocate of the High Court of Kenya, craves an order extending time to enable him file a notice of appeal out of time against the ruling and order of the ***Environment and Land Court (ELC) (Obaga, J.)*** dated 9th May 2017. By that ruling, the learned judge found that the respondent, ***Paul Thuo Njambi,*** was the legitimate owner of ***Plot No. 675, Kayole Spring Valley Resettlement Scheme (the suit property)***, having purchased the same from its previous owner, ***Kangiria Self Help Group***. He also found that the applicant had no legal basis to claim ownership of the suit property because the former owner had merely allowed him to use it as a carwash on temporary basis, on the express understanding that he would vacate once the former owner sold or had use for it. Accordingly the learned judge issued a mandatory injunction compelling the applicant to vacate the suit premises.

It is common ground that the ruling was delivered in the presence of the advocates for both the applicant and the respondent. The applicant, who subsequently claimed to be aggrieved by the ruling, did not file a notice of appeal within 14 day of the ruling as required by ***rule 75(2)*** of the ***Court of Appeal Rules***. On 10th July 2017 the applicant applied for extension of time to file a notice of appeal. The reason for failure to file the notice of appeal on time, as given in affidavits sworn by applicant and his advocate, ***Mandela K. Chege***, was that after delivery of the ruling, the said advocate tried on several occasions to apprise him through cell phone without success. He eventually sent him images of the ruling through *WhatsApp*.

On or about 20th June 2017, the applicant called the advocate to inquire about the ruling, explaining that he could not be reached in Marsabit where he works because of poor network coverage. At the applicant's request, the advocate sent the ruling by email and after travelling from Marsabit to Nairobi, the two met on 24th June 2017, which according to the applicant was a Sunday. The applicant instructed the advocate

to appeal the ruling, but explained that he needed time to look for money. Full instructions were given on or about 3rd July 2017 after which the application for extension of time was promptly made on 10th July 2017.

The respondent opposed the application vide a replying affidavit sworn on 6th September 2017, disputing the facts as narrated by the applicant. He averred that the mandatory injunction order was served upon the applicant's worker at the carwash on the suit property on 19th May 2017 and by the next day the applicant had relocated the carwash business from the suit property. In the respondent's view, the applicant vacated the suit property simply because he was fully aware of the court order. He added that the applicant had failed to attach any evidence in support of the averments in the supporting affidavits and that the two affidavits sworn by the applicant and his advocate were full of contradictions, indicating lack of candor on their part. He concluded by submitting that the intended appeal had no serious chances of success as the evidence on record showed vividly that the applicant was a mere licensee on the suit property.

When learned counsel for the parties appeared before me, they reiterated their respective positions as narrated above. The applicant relied on the decision of the Supreme Court in ***Nicholas Kiptoo arap Salat v. IEBC & 7 Others, SC. App. No. 16 of 2014*** and submitted that the power to extend time is discretionary and that among the factors to be considered are the interests of administration of justice; whether the application has been made promptly; whether the failure to comply was intention; and whether there is a good explanation for the failure. He also cited the ruling of this Court in ***Edith Gichugu Koine v. Stephen Njathi Thoithi, CA No. Nyr 11 of 2014*** to demonstrate a situation where the Court extended time because the intended appellant was not aware of the delivery of the judgment she intended to appeal. On his part the respondent relied on the ruling of the Supreme Court in ***Kenya Revenue Authority v. Habimana Sued Hemed & Another, SC CA No. 23 of 2015*** and submitted that extension of time is not a right of a party but an equitable remedy that is only available to a deserving party at the Court's discretion; that a party seeking extension of time has the onus of lying basis to the Court's satisfaction; and that delay should be explained to the satisfaction of the court. He also relied on the ruling of this Court in ***Aviation cargo Support Ltd v. St. Mark Freight Services Ltd, CA No. Nai. 98 of 2013*** and contended that an indolent applicant is not entitled to an order extending time. I have anxiously considered the motion on notice, the supporting and opposing affidavits, the submissions by the parties and the authorities they relied upon. The statement on the law on the considerations to be borne in mind in an application for extension of time is well articulated in the decisions cited by the parties and I do not find it necessary to rehash those principles here. (See also ***Fakir Mohamed v. Joseph Mugambi & 2 Others C.A. No. Nai. 332 of 2004*** and ***Leo Sila Mutiso v. Rose Hellen Wangari Mwangi, C.A. Nai. 251 of 1997).*** Suffice to emphasize that extension of time is a discretionary power which must be exercised judicially on the basis of the facts and reason, and not whimsically or capriciously. In ***Nicholas Kiptoo arap Salat v. IEBC & 7 Others (supra),*** the Supreme Court emphasized that extension of time is an equitable remedy and to entitle an applicant to it, he must act equitably. It is incumbent upon such applicant to be candid and honest. He should not be untruthful or try to mislead the Court.

In this application, I am persuaded that the applicant has been less than candid with the Court, in a bid to obtain extension of time. The following aspects of the application convince me of the applicant's lack of candor. Firstly, the evidence on record is crystal clear that the applicant vacated the suit premises immediately upon service of the order of the court. The record shows that the order was issued on 18th May 2017 and the process server, ***Paul Githinji Wanjohi*** avers in his affidavit of service sworn on 25th August 2017 that the order was served upon the appellant's worker at the carwash on 19th May 2017 at 10.15 am. The respondent has deposed in his replying affidavit that when he visited the suit premises the next day, 20th May 2017, he found that the applicant had relocated to a different plot. The applicant would have the court believe that he vacated the suit property without being aware of the court order whilst all along he had been laying claim to the suit property. I am satisfied that the applicant was fully aware of the court order on 19th May 2017 and that is why he vacated the suit property immediately the court order was served.

Secondly, I find the applicant's inconsistent statements about the date he learnt of the ruling rather telling. In the grounds upon which the motion is founded, he claims to have learnt of the ruling on 23rd May

2017. But in his further affidavit he deposes that he only learnt of the order on 20th June 2017, almost one month later than he had earlier averred.

Thirdly, when the respondent, in his replying affidavit faulted the applicant for failure to attach a copy of the email that was purportedly sent to him in June by his advocate advising him for the first time of the ruling, the applicant in his further affidavit, claimed that he could not produce the email because of advocate-client confidentiality. Yet in his earlier affidavit sworn on 6th July 2017, he had no hesitation attaching copies of emails exchanged between himself and his advocate on 4th and 26th October 2016 regarding the dispute, but well before the date of the ruling. I am therefore persuaded that the true reason for the applicant's failure to attach the email to his affidavit was simply because it did not exist.

Fourthly, both the applicant and his advocate were clear that they met on Sunday, 24th June 2017 at Ongata Rongai when the applicant gave the advocate instructions to appeal. A casual look at the calendar shows that 24th June 2017 was not a Sunday. The two surely could not make such a mistake in their separate affidavits, granted that Sunday is not a regular workday. When the respondent pointed out this anomaly, the applicant alleged in his further affidavit that he had made a mistake and that in fact they met on Sunday, 23rd June 2017. The problem, once again is that 23rd June 2017 was also not a Sunday! And 23rd June is the day the applicant claims in his first affidavit to have been reading the ruling for the first time at a cybercafé in Marsabit.

Lastly and most perturbing in my view, is the evidence that the applicant produced purporting to show that the learned judge had delayed the ruling for a long time and that is the reason he did not bother to call his advocate earlier to find our whether the ruling was delivered on 9th May 2017 as scheduled. The applicant's reasoning was that the learned judge had delayed the ruling several times before, so having not heard from his advocates, he assumed the ruling had been postponed once more. Of course if that were the case, it is not clear why he is the one who ultimately took the initiative to call the advocate in June. Be that as it may, according to the respondent, the delivery of the ruling was not adjourned even once. The date for the ruling of 9th May 2017 was set after conclusion of the hearing of the application for mandatory injunction and was delivered promptly on time.

To demonstrate that delivery of the ruling had been adjourned several times before 9th May 2017, the appellant annexed to his further affidavit three copies of his advocate's Court Attendance Sheet. The first shows that the advocate attended court on 23rd February 2016 for purposes of taking a date for the ruling, when the ruling was set for 9th May 2017. That does not make any sense at all because the ruling shows that the application for mandatory injunction was filed on 27th June 2016, meaning that the advocate was purporting to take a date for the ruling when the application had not even been filed. The next sheet indicates that the advocates went to take the date for ruling on 1st December 2016, when he found that it was not ready and the same was rescheduled to 23rd February 2017. The problem is that the sheet shows that attendance to have been before a magistrate, ***Hon. Gachora***, rather than the learned judge. The last sheet shows the applicant's advocate attending court on 1st November 2016 to take the ruling when he found that the court was not sitting. The remark on the sheet reads **"dates to be fixed by parties"**. If an advocate turns up to take a ruling and the court is not sitting, it is the court rather than the parties, which sets the new date for the ruling.

The ruling of the ELRC indicates clearly that there were other prior proceedings between the same parties over the suit property in the Magistrate's Court and that unfortunately, is some of the evidence that the applicant has presented to purport to show deferral of the date of the ruling by the learned judge.

Having considered all the above, I am persuaded that the appellant has not been candid and forthright with the Court and therefore does not deserve the benefit of an equitable remedy. The evidence on record convinces me that the applicant was fully aware of the delivery of the ruling immediately after service of the court order on 19th May 2017 and has not therefore presented before me any material on the basis of which I can excuse his failure to file a notice of appeal within the prescribed time. I find this application to be wholly bereft of merit and dismiss the same with costs to the respondent.

Dated and delivered at Nairobi this 6th day of November, 2017.

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR